IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 123 OF 2005

SHRI JOHN SEBASTIAN DIAS ....Applicants

Versus

SHRI B.ABDUL KADAR ....Respondents

Shri M.P.Amonkar,Advocate for the Applicant

Shri S. Singbal, Advocate for the Respondent.

Coram:- V.M. KANADE, J.

Date:- 20th July, 2005

Heard learned counsel for the Applicant and learned counsel for the Respondent.

Leave granted. Appeal is taken up for hearing forthwith.

The applicant is challenging the Order passed by the Magistrate dismissing the complaint for default by Order dated 7.12.04. By the said Order, the learned Magistrate was pleased to dismiss the complaint by exercising the discretion vested in him under S.256 of the Code of Criminal Procedure. Against the said Order, an application for restoration was filed before the learned Magistrate on the same day and the learned Magistrate was pleased to restore the complaint. Against this Order, the respondent herein preferred a revision application before the Sessions Court and it was contended that the Magistrate did not have power to review his own order in view of the provisions of Section 262 of the Code of Criminal Procedure. The Sessions Court accepted the contention raised by the respondent and set aside the Order of restoration passed by the learned Magistrate. Thereafter the complainant has preferred this appeal against acquittal challenging the Order passed by the Magistrate dated 7.12.04. It is contended by the learned counsel appearing on behalf of the

applicant that the learned Magistrate has not taken into consideration the ratio of the decision of the Supreme Court in the case of Associated Cement Company Ltd. Vs. Keshavanand, reported in 1998 Cri.L.J. 856.

The learned counsel appearing on behalf of the respondent has submitted that the applicant had an alternative remedy of filing a revision application in the Sessions Court and challenging the Order passed by the Magistrate under S.256 of Cr.P.C. He submitted that by virtue of the order of dismissal a substantive right was created in favour of the applicant and he submitted that since the complainant had remained absent, there was no reason to interfere with the Order passed by the learned Magistrate dismissing the complaint.

It is no doubt true that a Criminal revision application also could have been filed by the present applicant/appellant. However, since the complaint was dismissed and the accused as a result, was acquitted, he has a substantive right to file an appeal against acquittal.

I have perused the roznama which is annexed by the applicant. In the roznama it can be seen that the complainant has remained present almost on all the dates in the trial Court. The Supreme Court in the case of Associated Cement Company v. Keshavanand reported in 1998 Cri.L.J. 856 has laid down that the Magistrate while exercising his discretion vested in him under S.256 has to take into consideration whether the personal attendance of the complainant was necessary on the day on which the complaint was called out and dismissed and secondly, it is also the duty of the Magistrate to see whether it was possible to adjourn the case. In my view, the learned Magistrate ought to have adjourned the case to the next date to enable the complainant to remain present particularly when he had pursued the matter diligently and had attended the Court almost on all the dates.

In the result, the impugned Order dated 7.12.2004 dismissing the complaint for want of prosecution is quashed and set aside. The Criminal

complaint is restored to the file. The trial Court to decide the criminal case as expeditiously as possible and in any case within a period of six months.

The Criminal Appeal is allowed in the above terms.

V.M. KANADE, J.